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IN THE

Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

—v.—

WILLIAM NOAH, TERRY NOAH, GEORGE GIAKOUMAKIS, MARY LOU GIAKOUMAKIS, CHERYL MONDHEIM, JAMES HOUSE, and PAT HOUSE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE 21ST CENTURY INSURANCE COMPANY IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37(2)(a) of the Rules of this Court, this brief is respectfully submitted on behalf of *amicus curiae* 21st Century Insurance Company in support of the Petition for a Writ of Certiorari filed by Petitioner Allstate Insurance Company. The consent of the parties to the filing of this brief has been received, and has been submitted to the Court.[1]

Amicus 21st Century Insurance Company is a California corporation that transacts insurance business in California and other states. As of January 1, 1994, *amicus* had issued thousands of insurance policies in California providing earthquake coverage. All of them contained one-year contractual limitations provisions. Later in 1994, a significant earthquake occurred in Northridge, California (the "Earthquake"). Seven years later, the California legislature enacted California Code of Civil Procedure Section 340.9 ("Section 340.9"), which negated the one-year contractual limitations period and extended the period for insureds to bring claims for damage arising out of the Earthquake until December 31, 2001. Insureds in California were thus given legislative carte-blanche to bring renewed claims against their insurance companies for such claims. *Amicus* received over 2000 such claims which have so far resulted in total paid and estimated future costs, including costs for investigating alleged Earthquake damage and defending litigation, of over $150 million. The industry-wide cost of Section 340.9 is estimated to be as high as $500 million. This is in addition to compensation

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[1] No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation or submission of this brief.

totaling between $12.5 and $15.3 billion paid by insurers in the immediate aftermath of the Earthquake. (Assem. Com. On Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, p.2; Sen. Rules Com. Off. of Sen. Floor Analysis, Third Reading Analysis of Sen. Bill 1899 (1999-2000 Reg. Sess.) as amended May 2, 2000, p.4).

The California legislature's goal in enacting this retroactive legislation was to address allegations that certain policy holders had been misled by their insurers regarding the extent of damage to their properties following the Earthquake. *See* Petition at 15-17. The legislative means chosen to address this goal, however, was a statute that did not discriminate between claims made by misled policy holders and claims made by other policy holders. Rather, the statute revived *all* claims, as long as the insured contacted his insurer regarding potential damage before January 1, 2000. The Ninth Circuit acknowledged this overbreadth when it conceded that "[Section] 340.9 is undeniably broad in its scope, reviving Northridge earthquake claims *regardless* of whether the insurance company has been shown to have acted wrongly." *Campanelli* v. *Allstate Life Insurance Co.*, 322 F.3d 1086, 1099 (9th Cir. 2003) (emphasis added). The court nevertheless sustained the substantial retroactive impairment of California insurers' contractual expectations effected by Section 340.9, believing its hands were tied by a wholesale deference to state legislative judgment that this Court has never required. Notably, in assessing the constitutionality of the statute, the Ninth Circuit failed to perform the necessary analysis of the relationship between the purported problem and the legislative solution.

Amicus believes that its contracts may not be retroactively and arbitrarily redrafted by the California legis-

lature without violating the Contract Clause of the United States Constitution. *Amicus* accordingly agrees with and supports the arguments advanced by Petitioner in its Petition for a Writ of Certiorari. In this brief, however, *amicus* focuses on the manifest confusion among the Courts of Appeals in assessing the constitutionality of statutes that significantly—and retroactively—impair private contracts. Specifically, *amicus* urges the Court to clarify that giving deference to legislative determinations in such contexts does not relieve the lower courts of the responsibility for determining whether there is a required correlation between the legitimate public problem and the legislative solution.

SUMMARY OF ARGUMENT

The Contract Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 1, has historically played a critical role in limiting the States' power to interfere with contracts between private parties. Indeed, the Framers' original purpose in drafting the Contract Clause was to protect private debtor obligations. *See* 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 15.8 (3d ed. 1999). This Court's decisions have made clear that the three-part test distilled in *Energy Reserves Group, Inc.* v. *Kansas Power and Light Co.*, 459 U.S. 400 (1983) from this Court's earlier Contract Clause jurisprudence, applies both to contracts between private parties and to public contracts to which the State itself is a party.

A survey of Contract Clause cases in Federal Courts of Appeals in recent years, however, reveals deep confusion as to the proper degree of deference to be accorded legislative judgments of the necessity and reasonableness of

a statute that substantially impairs private contractual obligations. Some Circuits follow this Court's teaching that after a finding of significant impairment, a court must independently determine that the scope of the retroactive legislation is reasonably coextensive with the problem addressed. Other Circuits, notably the Ninth Circuit, from which the instant Petition emanates, have completely deferred to the legislative judgment as to the reasonableness and necessity of a statute impairing private contracts so that no true inquiry is made into the tailoring of the legislation to the stated harm. Indeed, in a series of recent decisions, the Ninth Circuit has misread *Energy Reserves* as signaling a "retreat" from this Court's prior Contract Clause opinions and as advocating total deference to state legislative judgment. This misreading has led the Ninth Circuit to give such perfunctory consideration to the third prong of the *Energy Reserves* test—ensuring that the retroactive legislation is both necessary and reasonable to address the stated harm—that it in essence allows States to engage in significant impairments of private contracts without any meaningful judicial review. Courts of Appeals in the First, Second, Third, Fourth and Eighth Circuits have generally adhered to this Court's teachings. The Ninth Circuit, as well as the Eleventh Circuit, have not.

The current case illustrates the error of wholesale deference. The "tailoring" analysis performed by the Ninth Circuit was so inadequate that its deference was all but conclusive. To permit lower courts to accord such undue deference to legislatures that have significantly impaired contractual rights would eviscerate the protections bestowed by the Contract Clause, a result contrary to the opinions of this Court and the intent of the Founders. *See*

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234, 245 (1978).

Amicus urges this Court to clarify that when private contracts have been substantially impaired by retroactive legislation, courts must not abdicate to legislatures the key constitutional determination that the retroactive legislation is reasonably tailored to address the legitimate public purpose sought to be addressed. Without this clarification, the meaning and vitality of the Contract Clause will be subverted.

ARGUMENT

The "*Energy Reserves* test," distilled from this Court's opinions in *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934) and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), instructs courts presented with a Contract Clause challenge first to assess, as a "threshold inquiry . . . 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Energy Reserves*, 459 U.S. at 411 (quoting *Allied Structural Steel*, 438 U.S. at 244). If a substantial impairment is found, the court must next determine that the State has justified the legislation as addressing a "significant and legitimate public purpose." *Id.* This prong of the *Energy Reserves* test is necessary to "guarantee[ ] that the State is exercising its police power, rather than providing a benefit to special interests." *Id.* at 412. Finally, the court must inquire "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' " *Id.* at 413

(quoting *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977)).

The *Energy Reserves* test represents this Court's accommodation between the unequivocal language of the Contract Clause, "one of the few express limitations on state power" in the Constitution, *United States Trust*, 431 U.S. at 14, and the " 'essential attributes of sovereign power necessarily reserved by the States to safeguard the welfare of their citizens." *Id.* at 21 (quoting *Blaisdell*, 290 U.S. at 435). Thus, the Contract Clause, originally intended to be a "constitutional bulwark in favor of personal security and private rights," The Federalist No. 44 (James Madison), was required to yield to the valid exercise of the States' police power. *Energy Reserves*, 459 U.S. at 413.

Neither *Energy Reserves* nor any other case of this Court, however, has abandoned wholesale the requirement that States may only substantially impair private contracts when it is necessary and reasonable to do so. The required deference to state legislative judgment cannot render judicial review superfluous. To the contrary, the determination of a substantial impairment has been recognized as only a "preliminary step" in the constitutional inquiry, while the remaining factors constitute the core of the analysis. *See United States Trust*, 431 U.S. at 21 ("[A] finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution."); *see also Energy Reserves*, 459 U.S. at 418 (conducting analysis of "the means chosen to implement these purposes" notwithstanding stated deference to the legislature); *Allied Structural Steel*, 438 U.S. at 247 (holding that "[t]he presumption favoring 'legislative judgment as to the necessity and reason-

ableness of a particular measure,' simply cannot stand in this case")(citation omitted); *Blaisdell*, 290 U.S. at 445. While *Energy Reserves* recognized the deference to be afforded to state legislatures, the decision cannot be read as eliminating the constitutional analysis altogether in the context of private contracts. Rather, in *Energy Reserves*, this Court pursued a detailed analysis of the reasonableness and narrowness of the Kansas Natural Gas Protection Act. *See Energy Reserves*, 459 U.S. at 418. Indeed, in *Energy Reserves* this Court recognized that "[a]lthough the legal issues and facts in [*United States Trust Co.* and *Spannaus*] differ in certain ways, they clarify the appropriate Contract Clause standard." 459 U.S. at 411. The "appropriate" standard set forth was the commonly known three-prong test; it did not abandon any aspect of the inquiry due to the private nature of the contract, noting only that because the State was *not* a party to the underlying obligations, "the stricter standard of *United States Trust Co.* does not apply." *Id.* at 413 n.14.

Total deference exempts questionable legislation from any inquiry at all as to the proper fit of the legislation to its purpose, and means, as a practical matter, that legislation that substantially impairs private contracts to which the State is not a party will routinely pass constitutional muster. Judicial review as to the tailoring of a statute, however, is essential to ensure that the Framers' intent that the Clause serve as a limitation on state power remains potent. *Allied Structural Steel*, 438 U.S. at 242 ("If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.").

In recent years, Circuit Courts have frequently undertaken the requisite inquiry mandated by this Court's Contract Clause jurisprudence under the *Energy Reserves* test. When assessing the constitutionality of challenged legislation that substantially impairs contracts between private parties, however, the Circuits have employed inconsistent levels of deference to state legislative judgments and have applied haphazard tailoring analyses.[2] The Courts of Appeals for the First, Second, Third, Fourth and Eighth Circuits have generally understood their obligations under *Energy Reserves* to determine that the retroactive state legislation that substantially impairs contracts to which the State is not a party is drafted reasonably to remedy the stated pubic purpose. Courts of Appeals from the Ninth and Eleventh Circuits, in the name of deference, have abdicated completely their responsibility to assess independently whether the legislation provides a reasonable fit to the problem addressed.

I. The Complying Courts of Appeals

Mercado-Boneta v. *Administracion Del Fondo de Compensacion Al Paciente*, 125 F.3d 9 (1st Cir. 1997) presented the First Circuit with a Contract Clause challenge to a statute abrogating a malpractice liability insurance fund. The Court acknowledged that a defer-

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[2] In contracts between private parties on the one hand, and state entities on the other, Circuit Courts have generally scrutinized the reasonableness and necessity of an impairment of obligations under a less deferential standard. *See, e.g.*, *Lipscomb* v. *Columbus Municipal Separate School District*, 269 F.3d 494, 511-12 (5th Cir. 2001); *University of Hawaii Professional Assembly* v. *Cayetano*, 183 F.3d 1096, 1106 (9th Cir. 1999); *McGrath* v. *Rhode Island Retirement Board*, 88 F.3d 12, 16 (1st Cir. 1996); *Condell* v. *Bress*, 983 F.2d 415, 418 (2d Cir. 1993). This less deferential standard is appropriate in these cases because the State stands to gain from its own retroactive impairment.

ential standard of review was appropriate, but reasoned it still "must undertake its own independent inquiry to determine the reasonableness of the law and the importance of the purpose behind it." 125 F.3d at 13. The court did so, determining that the abrogation was both reasonable and necessary to protect the public interest in a "well-functioning medical malpractice insurance system." *Id.* at 15. It concluded that the legislation's cut-off date for honoring claims under the old insurance system was sufficiently tailored to the legislative problem so that claims and the affairs of the insurance fund could be brought to finality. *Id.* at 17-18.[3]

The Second Circuit has also thoroughly analyzed the connection between the public problem and the legislative solution. In *Sal Tinnerello & Sons* v. *Town of Stonington*, 141 F.3d 46 (2d Cir. 1998), the court reviewed an ordinance that provided for the municipal takeover of commercial waste collection and disposal. The ordinance prohibited private parties from removing, transporting or disposing solid waste, thereby impairing existing contracts held by private haulers. Although the court expressed its opinion that there was a "serious question whether [plaintiff] can prove that the impairment is a substantial one," 141 F.3d at 53, it nevertheless undertook an inquiry as to the correlation between the municipality's stated goals and its chosen means. The court observed that the public purposes behind the ordinance included: (1) controlling disposal of solid waste without

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[3] *See also McGrath*, 88 F.3d at 16 ("Because this fourth component requires careful judicial scrutiny in all events, it is clear that a state must do more than mouth the vocabulary of the public weal in order to reach safe harbor; a vaguely worded or pre-textual objective, or one that reasonably may be attained without substantially impairing the contract rights of private parties, will not serve to avoid the full impact of the Contracts [sic] Clause.").

imposing a tax increase; (2) avoiding CERCLA liability by ensuring that waste disposal was conducted at a plant with the proper permits; and (3) providing an equitable volume-based user fee for generators of commercial waste. *Id.* at 50. In assessing whether the means chosen to accomplish these goals were reasonable, the court concluded that the municipal takeover ensured that solid waste would be delivered to an incinerator possessing the proper permits and served important economic interests by ensuring against defaults on the bonds that financed the plant and rendering unnecessary a government subsidy of the plant's tipping fees. *Id.* at 54. It further observed that the means chosen were reasonable in that outside haulers were permitted to continue to operate as contractors to the Town. *Id.* at 55.[4]

Nieves v. *Hess Oil Virgin Islands Corp.*, 819 F.2d 1237 (3d Cir. 1987) presented the Third Circuit with a constitutional challenge to a retroactive amendment of the Virgin Islands Workmen's Compensation Act which eliminated the "borrowed employee" doctrine as a bar to pending tort suits. Because the Virgin Islands was not a party to the contract, the Third Circuit rejected appel-

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[4] *See also Sanitation and Recycling Industry* v. *New York*, 107 F.3d 985 (2d Cir. 1997). In *Sanitation*, the Second Circuit addressed constitutional challenges to Local Law 42 which imposed restrictions on New York City's commercial carting business in an effort to combat the pervasive corruption in the industry. After concluding that the law substantially impaired existing carting contracts and that the City's stated goal of eradicating the vestiges of criminal control of the carting industry was legitimate, it proceeded to the "ultimate question" of whether the City "has chosen reasonable means to achieve its legitimate purpose." 107 F.3d at 994. It concluded that "gradually phasing out [old] contracts and arranging for new carting contracts to be negotiated in an atmosphere free of coercion is a reasonable accommodation between the impairment of plaintiff's contracts and the City's exercise of its police power." *Id.*

lants' argument that a heightened level of scrutiny should be applied because the Virgin Islands stood to recoup revenue from the legislation. Instead, the court deferred to the legislative judgment as to the amendment's necessity and reasonableness. 819 F.2d at 1243, 1249. But the court did not interpret deferential review to mean that no serious inquiry was required. Rather, the court looked to the legislative history of the enactment to discern that the legislature was aware that the primary impact of the amendment would be on the appellant and that the legislature expressly sought to overturn application of the borrowed employee doctrine in several pending cases against appellant. *Id.* at 1250. It thus concluded that the legislation was not aimed at the general welfare but rather was akin to special interest legislation. *Id.* at 1250-51. The court assessed the necessity and reasonableness of the means chosen to accomplish the legislature's stated goals to conclude that the retroactive application of the legislation could not be justified by the goal of recouping Workmen's Compensation expenditures, finding that "if recouping past expenditures could justify a retroactively established cause of action the circumscription of the Contract Clause would be rendered practically meaningless." *Id.* at 1251-52.[5]

The Fourth Circuit, as well, while acknowledging that deference was owed to the state's legislative judgment in the review of an impairment of a private contract, nev-

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[5] The Third Circuit also acknowledged that "extra" deference was required in the private contract arena in *Troy Ltd.* v. *Renna*, 727 F.2d 287 (3d Cir. 1984), to find that a retroactive amendment to New Jersey's Tenancy Act did not violate the Contract Clause. In so doing, however, the Third Circuit did not slavishly rubber stamp the New Jersey legislature's findings, but ascertained that the application of the retroactive amendment was restricted by a reasonable personal income test and the discretion of the New Jersey state courts. *Id.* at 298.

ertheless undertook its duty . . . simply and inescapably to give [its] independent, considered judgment as to whether [the South Carolina Automobile Reparation Reform Act of 1974] makes a rational accommodation between the affirmative power exercised by the state and the negative safeguard embodied in the Contract Clause." *Garris* v. *Hanover Insurance Co.*, 630 F.2d 1001, 1009 (4th Cir. 1980). The challenged law prevented automobile insurers from terminating agent contracts under certain conditions. The court compared the stated purpose of the law—"to make compulsory automobile insurance available on a nondiscriminatory basis to all drivers licensed by the state"—with the legislation's scope to determine if the "fit" between the two was reasonable. It determined that the legislation's strictures on agency cancellation rights were too attenuated from the legislation's goal to be necessary. While the court acknowledged that without the agency cancellation protections, some insurance agents might suffer economically, and thus, some drivers would be inconvenienced in procuring car insurance, other provisions of the Act provided adequate assurances that drivers would be able to procure insurance so as to satisfy the legislation's stated purpose. Thus, the agency cancellation provision was an unnecessary and unreasonable impairment of private contractual obligations. 630 F.2d at 1010-11.

The Eighth Circuit confronted a constitutional challenge to a Minnesota statute that, as a condition of participation in the state's Medicaid program, put a cap on the rates nursing homes could charge residents who did not receive state assistance benefits. ***Minnesota Ass'n of Health Care Facilities, Inc.*** v. ***Minnesota Department of Public Welfare***, 742 F.2d 442 (8th Cir. 1984). The court concluded that the portion of the law that prospectively

equalized the rates nursing homes could charge residents who received state aid with those who did not, was constitutional because the gradual implementation of the rate limitations was a reasonable means to achieve the important public purpose of providing "adequate compensation to prudently managed nursing homes." *Id.* at 451. However, in assessing that part of the statute which retroactively required restitution of charges in excess of the new statutory limits, the court determined that the statute went "too far" in "impos[ing] totally unexpected liability on nursing homes for charges that were permitted by law when collected . . . [and] disrupt[ing] settled and completed financial arrangements under contracts made in reliance on existing law." *Id.*

All these Courts of Appeals have thus adhered to the core obligation placed upon them by *Energy Reserves*, that of assuring that the retroactive legislation is tailored to address the stated public purpose and imposes no unnecessary impairment on contractual expectations. A starkly different result has been reached in the Ninth and Eleventh Circuits.

II. The Non-Complying Courts of Appeals

The obligation imposed by *Energy Reserves* to ensure that retroactive legislation effects no more of an impairment than is necessary to address the stated public purpose, has, in recent years, been treated by the Ninth and Eleventh Circuits in a cursory and one-dimensional manner. The Ninth Circuit, as reflected in this case, has erroneously read the third prong of the *Energy Reserves* test as either requiring nothing but a rubber stamp to the State's legislative judgment or at most, the application of a pro forma inquiry that is neither thorough nor

searching.[6] In two cases released after this Court's ruling in *Energy Reserves*, the Ninth Circuit articulated the jurisprudential background of its ruling in this case. In both, the Ninth Circuit articulated a reading of *Energy Reserves* that is inconsistent with that case.

In *Nevada Employees Ass'n* v. *Keating*, the Ninth Circuit declared—as this Court never had—that in *Energy Reserves* this Court had "retreated from its holding in *Spannaus*" (a case in which this Court struck down a Minnesota statute which impaired private contracts), in what it termed "a renewed willingness to defer to the decisions of state legislatures regarding the impairment of private contracts." 903 F.2d 1223, 1226 (9th Cir. 1990).[7]

Again, in *Seltzer* v. *Cochrane*, the Ninth Circuit mischaracterized *Energy Reserves* as representing a "shift in the law" which emphasized all but total deference to state legislatures. 104 F.3d 234, 236 (9th Cir. 1996). In assessing a trustee's objections to an exemption claimed by debtors in their individual retirement accounts, the court held that the trustee had failed to meet his burden of demonstrating that the retroactive application did not "serve a valid public purpose," indicating that the cases

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[6] The Ninth Circuit, on the other hand, has recognized the importance of this inquiry when examining contracts to which state entities are parties. *See, e.g., University of Hawaii Professional Assembly* v. *Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999) ("An impairment may not be considered necessary if there is 'an evident and more moderate course' of action that would serve Defendants' 'purpose equally well.' ") (citation omitted).

[7] *Keating*'s conclusion that *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983) also signaled a "retreat" by this Court from its previous Contract Clause jurisprudence is similarly incorrect. *Exxon* belonged to a subset of Contract Clause cases addressing price scheduling in the utility market, which governed the Court's decision.

on which the trustee had relied in which the Ninth Circuit previously invalidated retroactive application of such state exemption statutes, "were decided before *Energy Reserves*, and thus did not give appropriate deference to legislative judgments."[8] *Id.*

The same mistaken view of *Energy Reserves* informed the Ninth Circuit's treatment of this case. In upholding the constitutionality of Section 340.9, the Ninth Circuit utterly eschewed the third component of the *Energy Reserves* test even after concluding that "Section 340.9 substantially impairs contracts between insurers and insureds." 322 F.3d at 1098. In so doing, the court relied on *Seltzer*, *supra*, to conclude that "[u]nless the state is a party to the contract, courts 'defer to legislative judgment as to the necessity and reasonableness of a particular measure.' " *Id.* Although the court ostensibly reviewed the "character" of Section 340.9 and its " 'appropriate[ness] to the public purpose justifying the legislation's adoption,' " *id.* at 1099 (citation omitted), its analysis was, in fact, nothing but an abandonment of the very notion of judicial review.[9]

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[8] The cases were *In re LaFortune*, 652 F.2d 842 (9th Cir. 1981), *In re Bassin*, 637 F.2d 668 (9th Cir. 1980) and *England* v. *Sanderson*, 236 F.2d 641 (9th Cir. 1956). In *In re La Fortune*, particularly, the Ninth Circuit illustrated its original correct apprehension of the proper constitutional analysis, albeit pre-*Energy Reserves*. Specifically, the court there conducted a thorough review of the fit of the California bankruptcy exemption, 652 F.2d at 848, a point which the Ninth Circuit in *Seltzer* explains as "not giv[ing] appropriate deference to legislative judgments." 104 F.3d at 236.

[9] Notably, the decision in *In re Garrison*, 108 B.R. 760 (Bankr. N.D. Okla. 1989), which the Ninth Circuit explicitly rejected in *Seltzer*, made the very argument advanced by *amicus* here. In *Garrison*, the Bankruptcy Court of the Northern District of Oklahoma disagreed with the argument advanced by the debtor that "courts must

The Ninth Circuit recognized that the stated purpose of Section 340.9 was to remedy the purported misleading of insureds, *id.* at 1099; however, it sustained a statute which did not discriminate between misled insureds and other policy holders. In fact, Section 340.9 was so broad that any insured who merely "contacted" his insurer prior to January 1, 2000 regarding "potential damage" was given the benefit of the seven-year legislative extension of his or her contractual right to submit a claim. While the Ninth Circuit stated that there were "limits" to the statute, it made no meaningful inquiry as to the proper "fit" between the problem posed and the solution presented. The "limits" cited by the

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defer absolutely to the legislative judgment as to the necessity and reasonableness of a particular measure, effectively striking the third step or test in the [*Energy Reserves*] analysis." 108 B.R. at 766-67. The debtor's supposed authority for such a sweeping statement was from this Court's decision in *Energy Reserves* and its predecessors, but the court disagreed, holding that "[n]either of these authorities say anything about absolute deference by courts to the whim of the legislature, no matter how ill-explained or ill-advised." *Id.* at 767. Rather, the court held that

> "[a] fair reading of the statement of the third test in *Energy Reserves* . . . indicates that the question of reasonable legislative means in Contract Clause cases should be treated somewhat like the question of reasonable legislative means in other cases wherein courts are asked to 'review . . . economic and social legislation.' In other such cases, courts are not expected to give absolute deference to legislative judgment. Legislative means must appear at least minimally reasonable to the courts in cases involving police power, substantive due process, and equal protection." *Id.*

Looking to *Marbury* v. *Madison*, 1 Cranch 137, 175-180 (1803), the court explained that its conclusion "is what one would expect, since courts of the United States do not abdicate decision of constitutional questions to the legislature." *Id.* Finally, it concluded that "[t]his Court will look at legislative enactments respectfully, but will not shut its eyes." *Id.*

Ninth Circuit have little if any relationship to the stated harm, and thus cannot be viewed as tailored to the stated public purpose. Indeed, the Ninth Circuit acknowledged that "[Section] 340.9 is undeniably broad in its scope, reviving Northridge earthquake claims regardless of whether the insurance company has been shown to have acted wrongly." *Id.*

The first so-called "limit" recognized by the court, that Section 340.9 "revives only claims that resulted from the Northridge earthquake, a one-time event with a discrete, albeit large, number of victims," *id.*, itself acknowledges that the number of claims potentially attributable to such a statute can be (as it has been) astounding, thus underscoring the overbreadth of the statute. That the statute was "limited" with reference to the very event that precipitated its enactment is not even meaningful; this supposed limit does not tailor the breadth of the statute to the purpose of its enactment. The court recognized that the second supposed "limit," that "only plaintiffs who had contacted an insurer prior to January 1, 2000, have their claims revived," *id.*, would prevent fraudulent claims invented to take advantage of the new statute, but failed to acknowledge that it did not address the wrongs which allegedly prompted the legislation. Finally, the third "limit"—the temporal restriction of one year—does not advance the reasons for the statute or contain its sweeping scope. *Id.* As the court itself acknowledged, even a one-year revival was sufficient to cause substantial impairment of private contracts. *Id.* at 1098.

As a practical matter, then, Section 340.9 revived claims without any regard to the supposed culpability or misconduct that the legislation was designed to remedy. It is apparent that in sustaining the constitutionality of

the statute, the Ninth Circuit did not begin to employ the necessary "independent, considered judgment as to whether the legislative enactment makes a rational accommodation between the affirmative power exercised by the state and the negative safeguard embodied in the Contract Clause." *Garris*, 630 F.2d at 1009.

The Eleventh Circuit, as well, appears to have abdicated its constitutional duty to review the fit between a Florida statute that forced insurers to continue to provide residential line insurance for hurricane damage in the wake of Hurricane Andrew and the public purpose it was designed to address. *See Vesta Fire Insurance Corp.* v. *Florida*, 141 F.3d 1427 (11th Cir. 1998). The court found that the legislation substantially impaired the insurers' contractual rights because they were "forced to continue contractual relationships that otherwise, pursuant to the terms of the contracts, could be rightfully terminated." *Id.* at 1433. The court next determined that Florida had demonstrated a legitimate public purpose for the legislation in the protection and stabilization of the Florida economy and real estate market. *Id.* at 1434. When it reached the third prong of the *Energy Reserves* test, however, the Court conducted no analysis whatsoever. It summarily concluded that "[t]he State was no party to the insurance contracts; so based upon the legislature's judgment, the statutes' impact on existing insurance contracts cannot be said to be an unconstitutional impairment." *Id.*; *see also Lipscomb*, 269 F.3d at 505 (in determining whether the subsequently adopted Mississippi Constitution's impairment of certain school land leases violated the Contract Clause, the court noted that were it reviewing a purely private contract, it would "not independently review the reasonableness of the legislation; it [would] defer to the judgment of the legisla-

ture"); *Walker* v. *Mather*, 959 F.2d 894, 899-900 (10th Cir. 1992) (acknowledging that an Oklahoma bankruptcy exemption statute "may not be an 'example of legislation at its fairest' " but concluded that the court could not upset the legislature's policy choice).

Although this Court has recognized the deference owed to legislatures in examining the constitutionality of statutes that impair private contracts, it has never suggested bypassing, as the Ninth Circuit did here, analysis of the "means chosen to implement the[ ] purposes." *Energy Reserves*, 459 U.S. at 418; *see also Allied Structural Steel*, 438 U.S. at 244; *United States Trust*, 431 U.S. at 22. Such an approach would gut all meaning from the protections afforded by the Contract Clause. This Court should take this opportunity to assure that retroactive legislation that does significantly impair contracts is subject to the level of judicial review that the Contract Clause requires.

CONCLUSION

For the foregoing reasons, this Court should grant a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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